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Civil procedure summary

Civil Procedure (University of South Africa)

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:: Basic differences and distinctions between substantive and adjective law ::

- Substantive law and adjective law are dependent on one another. Substantive rights could not be enforced if adjective law did not exist for this purpose. Adjective law is accessory to substantive law since it is dependent on the existence of substantive law
- Criminal procedure enforces the substantive principles of criminal law just as civil procedure enforces the rules and provisions of civil law
- Rules of substantive law define the rights and duties of persons in their ordinary relationship with e o; describes the nature of these rights and duties, the manner in which they are est., what their legal effect is and how they are terminated
- Adjective law – 'procedural law'. Law of procedure enforces the rules and provisions of substantive law; deals with procedure to be adopted in order to enforce a right or duty; is accessory to substantive law; existence of substantive law creates the need for rules of procedure to enforce substantive provisions; provides the procedures through which the courts may enforce compliance with the provisions of substantive law

:: general difference between civil and criminal proceedings ::

Civil proceedings = liability, not guilt, is est.

:: function of courts ::

- To resolve disputes btwn legal subjects or btwn legal subjects and the state
- Civil and criminal proceedings can be described as formal systems of dispute resolution that are sanctioned by the state
- Judicial officer will hear the presentation of evidence and arguments of both parties in an environment that is controlled y formal rules, and then decide the matter in form of judgment or order that is enforced by state

	:: Civil proceedings ::	:: Criminal proceedings ::
:: subject matter of proceedings in each instance ::	Relate to a dispute btwn legal subjects Described as a claim *is possible for a person to lay a criminal charge and institute civil proceedings on same cause of action	Btwn State and ordinary citizen State acts through prosecutor in mag crt and state advocate in H.Crt on behalf of citizen against whom the alleged offence has been committed Arise from alleged transgression of rules of common law dealing with crimes or stat provisions of criminal law
:: role of and terminology relating to the parties to these proceedings ::	In matter commenced by summons, person who starts proceedings by issuing a summons = plaintiff Person against whom summons is issued = defendant Proceedings brought on	Parties are State and accused Person who suffered as a result of criminal conduct of acc is complainant State prosecutes acc on behalf of compl State initiates proceedings and

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	application, person bringing appl = applicant Opposite party = respondent If matter goes on appeal, person lodging appeal = appellant Other party = respondent	conducts procedures
:: differing objectives of civil and criminal proceedings ::	To establish the liability of defendant/respondent to compensate the plaintiff or to perform or not perform acts in relation to the plaintiff/applicant	To establish whether the accused is guilty of a crime and to impose a penalty if so
:: nature of compulsion involved ::	Voluntary – aggrieved party is not compelled to commence proceedings At discretion of plaintiff/appl If doesn't initiate proceedings – ends there If defendant/respondent choose not to defend/respond then judgment is granted in their absence Can reach out of court settlement by negotiation/withdraw proceedings State has no interest, provides infrastructure Crt will not interfere except upon application Parties are compelled to follow rules of crt which prescribe minimum stds for conduct of proceedings	Element of compulsion State may initiate criminal proceedings wo consent of complainant Accused is compelled to appear before crt to hear and defend the criminal charge
:: onus of proof ::	Balance of probabilities Crt must be satisfied that version put forward by plaintiff/appl is more probable than that put by def/resp	Beyond all reasonable doubt That acc committed offence as charged Crt must be satisfied that no probable conclusion other than that the accused committed the offence so charged, can be reached

:: implications of term 'inherent jurisdiction' ::

- Its jurisdiction is derived from common law and not from statute
- Superior crt exercising its inherent jurs has a discretion in regard to its own procedure
- Crt may condone any procedural mistakes or determine any point of procedure
- S 173 Const

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:: meaning of phrase 'creatures of statute' ::

- Lower crts do not have inherent jurisdiction
- They derive their powers from the particular statute which created them
- Exercise of jurs in lower crts is dependent on the extent to which its enabling statute permits it to exercise such jurs
- Each enabling statute has to be carefully interpreted in order to determine scope of jurs
- Mag crt (created by leg and derives powers and competence from Mag Crts Act of 1944

1. why superior courts may exercise an inherent jurisdiction?

A superior court exercises inherent jurisdiction because its competence is not reliant only on statutory law but also on common law. This is confirmed by section 173 of Constitution. Because it has inherent jurisdiction a superior court may condone a mistake in its procedures

2. why inferior courts are creatures of statute?

A lower court is a creature of statute because it is restricted to the competence conferred upon it by its enabling (constituent) Act

:: who has the competence to make, amend or repeal rules of court ::

- From 1965, proceedings have been uniformly conducted in all divisions of the then Supreme Court, now the High Courts, under a common set of rules still known as the Uniform Rules of Court
- Competence to make rules now vests in the Rules Board
- S 16 Constitutional Court Complimentary Act provides that president of CC, in consultation with chief justice, may make rules relating to the manner in which that Crt may be engaged and for all matters relating to the proceedings of and before that Crt
- Minister of Justice may make rules that regulate proceedings in small claims crts

:: nature of rules of court ::

- Rules of court have statutory force and are binding on a court (delegated leg)
- Rules exist for a crt and not crt for rules
- Purpose of rules is to facilitate inexpensive and efficient litigation and not to obstruct the admin of just
- Crt, subject to its competence to do so, may condone non-compliance with procedure that would lead to substantial injustice to a litigant
- Superior crt may exercise its inherent jurs to grant relief in circumstances where rules do not cover a particular matter or where strict compliance with a rule would result in substantial prejudice to a litigant

:: important common law sources for civil procedure ::

- civil procedure of the High Court does not consist exclusively of statutory provisions and rules of court
- a portion of it comprises rules of common law

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- especially in the matter of provisional sentence one finds the appropriate rules in the common law with the rules of court themselves affecting only a small part of provisional sentence
- many of our rules of courts and statutes are based on English law and that our system of pleadings is largely modelled on the English one
- when it comes to the interpretation of such rules of court and statutes or when guidance is sought in drawing up pleadings it is often profitable to refer to English procedural law
- page 17 sg

:: important statutes ::

1. Supreme Court Act 59 of 1959
2. Magistrates' Courts Act 32 of 1944
3. Small Claims Courts Act 61 of 1984

:: differences between Anglo-American and Continental systems of civil procedure ::

- SA adheres to the adversarial system of litigation
- all SA courts (except small-claims courts apply adversarial principles and procedures)
- Continental civil procedure → inquisitorial, controlled and conducted by judicial officer, judicial officers participate directly in process of litigation from commencement of proceedings to conclusion of proceedings, actively involved in and determine facts of case
- pleadings are in the form of notice to the parties & include evidence, may be involved in gathering evidence, may ask questions and lead evidence, judicial officer is trier of fact and law, reliance on statutory law, courts decisions are persuasive only
- Anglo-American → adversarial, regards litigation as pvt, relies on legal representatives of parties to prosecute respective claims, legal representatives responsible for gathering and presenting evidence, marked by its morality, *viva voce* evidence is led by the counsel for both litigants by means of examination, cross-examination and re-examination, judicial officer give oral judgment, distinct pre-trial and trial stages
- pre-trial = opens with exchange of pleadings btwn litigants to define issues in dispute, after pleadings have closed a trial date is requested & litigants prepare cases for trial → judicial officer plays a passive role, doesn't interfere with proceedings except upon request of one of litigants

::principles of bilaterality, party-prosecution and party presentation ::

Adversial procedure: both litigants; independently initiate and prosecute their respective claims or defences; investigate and gather info that supports their respective claims or defences & present this as evidence before a court

BILATERALITY

- assumes that both litigants will have a fair and balanced opportunity to present either their respective claims or defences
- belief that the truth will emerge if each party presents his own biased view of issues in dispute
- as rivals each litigant presents separate and contradictory versions of the case for consideration by the court

PARTY PROSECUTION

- competence of a litigant either to commence or defend proceedings and to move the case

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forward through all its procedural stages
- reinforces notion that litigation is a put matter that is conducted by both litigants wo any interference from court except where its intervention is requested by a litigant
- a person whose substantive rights have been infringed or alienated has a choice either to commence civil proceedings or simply to do nothing about the matter
- see pages 21 sg

PARTY PRESENTATION

competence of a litigant to investigate his own cause or defence to formulate the issues in dispute as well as present the material facts concerned and to prove these facts and raise

:: role of court ::

- role of judicial officer is passive (exception is commissioner of a small claims crt)
- he is restricted to evidence that the litigants have chosen to present during a trial or hearing on motion
- judicial officer may not introduce new evidence or raise additional matters of law
- judicial officer is not responsible for ensuring that the case presented by each litigant is complete
- judicial officer reaches a decision on case purely on basis of the evidence and arguments in law put by each litigant
- judicial officer is not permitted to participate in pre-trial stage (unless requested)
- application of principles of party prosecution and party presentation override
- clear separation btwn investigative and decision-making aspects of litigation
- during pre-trial stage investigative function is sole responsibility of litigants
- during trial stage judicial officer is dependent on how well litigants performed their investigative function during pre-trial stage & thoroughness of presentation at trial
- judicial officer may direct the case within the confines of the issues presented by the parties during the trial stage
- role of judicial officer remains passive because the litigants bear the final responsibility for commencing proceedings defining issues in dispute gathering facts for presentation as evidence and generally conducting the case through the successive stages of litigation

:: critical appreciation of the adversarial system as well as methods of civil procedural reform ::

- purpose of the adversarial system is to elicit the truth by means of presenting opposing views in respect of the same case – system is based on certain assumptions that do not always reflect reality
- although in theory both litigants have an equal opportunity to present their cases they do not necessarily always have the same financial resources to conduct litigation nor are the skills of counsel equally matched
- rivalry caused by a competitive approach to litigation does not necessarily ensure that the litigants acting through counsel will fully disclose the facts especially those which might discredit their own cases
- because the system operates in a manner that promotes a partisan approach to litigation litigants are prone to using procedure for tactical purposes in order to further their own individual interests and to demoralize opponents
- does not reconcile the litigants but rather tends to accentuate their differences & consequently heightens the conflict
- the system itself forces to lawyer to reshape the litigants human problem into legal and procedural categories which meet the demands of the system but very often do not represent the litigant's actual human needs

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- courts play a vital role in fulfilling the governmental function of maintaining order in society and proceedings are conducted in open courts
- procedural delays have serious personal and financial consequences for litigants because they are unable to lead normal lives or continue trading freely
- access to court is free – court admin and court time is provided for free by the state but there are costs for litigation
- judicial officers decide the matter impersonally in the role of a passive umpire – attention focuses on weight of evidence and the merits of the legal arguments presented by each party; judgment is granted in favour of only one litigant and unless absolution of the instance is granted there is always a winner and a loser
  system does not permit a method of decision-making that reconciles the conflicting interests of litigant's and this has the effect of increasing the tension btwn litigants

- judgment of court is enforced by executionary procedures that are sanctioned by the state & thus compliance with a judgment is ensured by means of coercion and not by means of consent of parties concerned

reform:

1. by means of continual revision of rules of court
2. increase the jurisdictional limits of lower courts
3. exclude specific types of disputes from court system
4. establishing alternative fora (courts)
5. through the use of informal dispute resolution processes

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:: development, general structure and principles of ADR ::

- a system of dispute resolution that uses a variety of informal processes as a means of resolving disputes both inside and outside of the court system (ALTERNATIVE DISPUTE RESOLUTION)

- primary processes → negotiation mediation and arbitration

ADR processes are:

1. informal (not bound by strict rules or constrained by technicalities)
2. flexible (adapted to suit needs of disputes)
3. voluntary (not compelled)
4. consensual (function on basis that outcome of process is reached through consent of both parties)
5. interest based (interests predominate rather than rights)
6. relational (emphasis on relationship)
7. future orientated (concentrate on establishing or re-establishing future relationships btwn disputants)

Litigation:

1. rules prescribe how proceedings must be conducted
2. process used to compensate for unlawful injury; adjust behaviour or regulate and maintain public policy
3. state-sponsored method of resolving civil disputes

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4. public process by comparison to pvt processes
5. formality and technical processes and procedures are necessary to protect the procedural rights of litigants
6. regulated and controlled by external rules (rules of court and statutory provisions)
7. command process → decision in form of a judgment is imposed on litigant's by a judicial official and that this decision is enforced under the sanction of the state (execution proceedings)
8. purpose of litigation is resolution of a dispute in form of a judgment of court → judgment is the purpose to which all proceedings are directed

:: negotiation, mediation and arbitration as primary processes ::

- the function of each primary process has been extended by means of the development of independent processes derived from a primary process known as derivative processes
- elements of two or more of the primary processes have been combined to form totally new processes that are called hybrid processes

::negotiation::

a private; voluntary and consensual process whereby two or more disputants seek to resolve their differences personally by means of an agreement that governs their future relationship

characteristics:

1. resolution of disputes
2. private
3. voluntary
4. consensual
5. negotiation is a process [orientation stage (assess each other and issues under negotiation); positioning stage (gather info & take fixed positions on issues in dispute); bargaining stage (issues narrowed & concessions traded in order for parties to reach an agreement); close-out stage (negotiation terminates either in a failure to agree or in an agreement often in writing & arrangements made to carry out agreement) MUST GO THROUGH ALL STAGES]
6. two or more disputants
7. agreement that governs future relationships

- in negotiation the emphasis is on the disputant's relationship and not on the development of consistent legal rules as is the case in litigation. The purpose of the agreement is therefore to regulate the future relationship btwn the disputants based on respect for their common interests rather than on the maintenance of their legal rights

::mediation::

private; voluntary and consensual process whereby two or more disputants agree to resolve their dispute through the intervention of a third party a mediator who should be impartial and accepted by both disputants

1. private; voluntary and consensual
2. process (lacks formalities) [pre-mediation stage (initial contact; explains process; arrangements made; rules); opening stage (commences; statement by disputants; mediator summarizes); middle stage (explore options; test reality of options; possible solutions); closing stage (final bargaining; decisions recorded; closing statement; process terminated)]
3. intervention by a third party (the mediator) [controls process; assist and guide; may not

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impose a decision on disputants]

4. impartial and accepted by both disputants [fair and act wo prejudice

::arbitration::

process whereby the disputants voluntarily and jointly ask a third party the arbitrator to hear both sides of the dispute and thereafter to make an award which the disputants undertake in advance to accept as final and binding

decision in form of an award is imposed on disputants -> decision can be made and enforced as an order of crt; final and binding; arbitrators competence to impose the awards arises from consent of disputants to accept award (unlike litigation); method of decision making is by means of adjudication, means that arbitrator makes a binding decision on the basis of the evidence and arguments both sides present; arbitral award is binding only on disputants; arbitration can be regarded as an adjudicative method of problem solving – it addresses and resolves a problem by means of a final and binding decision that applies only to disputants, and to no one else

arbitration is like neg and med, in that it allows a great deal of party control over the process. Disputants may: 1. Select the arbitrator on grounds of relevant expertise 2. Choose the rules of arbitration that must be applied by arbitrator 3. Determine the issues in their submission to arbitration 4. Arrange matters relating to the venue for the arbitration, date for hearing, as well as the payment of costs

is flexible, possible to adapt the process to suit needs to dif situations (dif to litigation)

s2 of Arbitration Act prohibits the arbitration of matters relating to the status of a person

- arbitration and litigation are command processes
- negotiation and mediation are consensual processes

:: derivative processes, such as conciliation, facilitation, expedited arbitration and documents-only arbitration ::

DERIVATIVES OF MEDIATION

1. conciliation:

- refers to a form of mediation, with the difference being that the third party intervenor (conciliator) takes a more directive approach during the mediation and may make a recommendation in regard to outcome
- mediator has a directive function, but is restricted to guiding and assisting disputants in neg; doesn't interfere in outcome of mediation
- conciliator goes further and advises disputants during neg in hope that this advice will lead to settlement; may finalise the process by giving a non-binding recommendation which it is hoped will persuade disputants to settle dispute; 'advisory mediator'

2. facilitation:

- used in situations where reaching an agreement is not necessary
- suited to creative problem solving rather than specifically settling disputes

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- used in grp dynamics
- more flexible, less structured and has more potential uses than mediation

DERIVATIVES OF ARBITRATION

1. expedited arbitration:

- rules of arbitration have been simplified in order to avoid delays and to speed up hearing 'fast track arbitration'
- pace of process of arbitration may be speeded up by; doing away with certain formal rules of evidence, shortening the periods within which documents must be exchanged, giving the arbitrator an active rather than a passive role at the hearing

2. documents only arbitration:

- conducted purely on basis of documents submitted by each disputant to the arbitrator, wo need for an arbitral hearing
- occurs when there is little or no dispute on the basic facts and the dispute relates to a matter of interpretation of a contract or where certain conclusions need to be drawn from the facts

- also QUALITY ARBITRATION (expert is requested by disputants to give a binding decision in regard to type or quality of a certain product [coffee beans/olive oil] presentation and testing of evidence as well as arbitral hearing are dispensed with – based solely on credibility, experience and expertise of arbitrator) and FINAL-OFFER ARBITRATION (arbitrator's competence to decide the matter is modified; arbitrator may make an award only on basis of the most reasonable of last offers made by each disputant; arbitrator may not choose a middle path but must choose only one of offers; purpose is to discourage excessive demands on part of both parties; disadvantage is that arbitrator may be compelled to choose btwn one of two offers no matter how absurd or irrational each one is)

:: formation of hybrid process ::

- hybrid processes are original to ADR
- within system of ADR, primary processes have proved to be so flexible it has been possible to combine elements of one primary process with elements of another process to form a totally new process, know as a hybrid process
- MINI TRIAL:
- Combination of the processes of litigation and negotiation
- Imitates the trial procedure as a means of communicating info that eventually forms basis for a negotiated settlement
- Two stages:
    1. An exchange of info conducted in manner of an abbreviated trial
    2. Settlement negotiations
- Purpose is to settle legal disputes btwn companies, especially when the claim involved is very high
- Legal problem is translated into business terms by means of mini-trial

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- Neutral advisor supervises process
- Essential that senior executives of both companies should attend both stages of process and that they should have authority to settle the issues on basis of negotiation
- During info stage – legal counsel for each side gives an abbreviated version of each party's 'best case' (that is minimum procedural std)
- Neutral advisor controls this stage; exchange of info is for benefit of senior company executives who must be present
- Once completed – senior comp exec meet pvt and in good faith to settle issues on basis of info they have obtained during first stage
- If unable to neg a settlement – neutral advisor must then give an advisory opinion on merits of case
- Senior comp exec meet 2nd time in effort to settle matter on basis of advisory opinion
- If settlement can't be reached, process is terminated or each party may submit written offers to settle, which in turn form basis for neutral advisor to mediate a settlement
- Mini-trial is highly sophisticated form of neg that is supported by precision with which trial procedure determines facts
- Process is fast, effective and cheaper than protracted litigation
- MED/ARB and ARB/MED:
- Primary processes are linked into a single process through the intervention of same 3rd party intervenor who controls both processes, irrespective of sequence
- Mediator becomes the arbitrator for purposes of Med/Arb and vice versa
- Result is a single and continuous process and not two separate processes
- Two primary processes are combined into a single and independent process
- Intervenor is no longer a mediator nor arbitrator but med/arb or arb/med
- MED/ARB
- Has definite psychological effect on disputants
- Enter into med first, knowing that if they don't settle differences, med will be converted into arb ito which a decision will be imposed
- Threat of future arb impacts on initial stage of med, thereby encouraging a med settlement
- Nb advantage – disputants enter med in an extremely thorough state of preparedness in anticipation of arb that might follow if they don't settle
- Disputants understand weaknesses and strengths of their respective cases, which is unusual in regard to a normal med
- Disadvantage – med also acts as arb
- Q is capable of applying natural rules of justice to arb
- As former med, arb has intimate knowledge of merits of both parties' case including very confidential info that s disputant might have disclosed pvt to him during med but would never have disclosed for purposes of arb
- Always risk that med/arb might introduce confidential info disclosed during initial stage of med into arb award
- ARB/MED
- Three stages 1. Arbitration stage 2. Mediation stage (and if matter not settled) 3. Award stage
- Arb stage consists of normal procedure for arb

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- At close of cases for both parties, arb is converted to med
- Med stage, mediation committee is formed, consisting of arb/med and representatives from both sides
- Task of arb/med is to assist and persuade both disputants to settle on basis of the info and issues that become evident during arb
- If settlement isn't reached, 3rd stage commences
- A binding arbitral award finalises the process
- Award normally reflects agreement that the disputants should have reached during med stage
- Doesn't suffer from serious defects of med/arb
- Number of advantages: 1. Issues disputants would have raised at an independent med are tested in evidence during arb (when med stage of arb/med commences disputants are fully aware of strengths and weaknesses of their respective cases) 2. During med stage, disputants are able to influence process in that they are able to debate and negotiate issues with arb/med 3. Disputants have advantage of neg with eo an agreement based on what they would like to have in arbitral award (through arb/med)
- By comparison to an independent med, 3rd stage of arb/med ensures that the process ends with a final and binding decision

:: critical strengths and weaknesses of ADR by comparison to litigation ::

- By its nature, litigation is formal, prone to delay, extremely costly and concentrates on rights rather than the personal interests of litigants

- Litigation has the advantage of est. Legal certainty on basis of rights by means of a binding decision that is enforced through the sanction of the state

- Litigation is the only process that is used to determine all civil disputes, ranging from divorce to commercial disputes, from patent claims to the interpretation of contracts and from upholding the best interests of a child to determining compensation for damages

- Under ADR systems, there are many processes from which to choose the most appropriate one to meet the needs of a particular type of dispute

- ADR offers option of selecting an informal and pvt process as an alternative to official state-sponsored process of dispute resolution (litigation)

- Litigation becomes one of many processes that may be selected as appropriate method for resolving a particular dispute

ADR: positive characteristics

1. Have effect of translating a legal dispute into a frame of reference that expresses personal needs of disputants – result of converting a rights-based dispute into an interest-based problem. ADR processes enable disputants to

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'own' process of dispute resolution (select process, define issues, est. Stds, responsibility for outcome)

2. Private. Settle differences wo having to divulge personal/confidential info (exception = crt-ordered or crt-annexed med or arb)
3. Address interests of disputants & avoid aggressive bargaining about legal rights
4. Purpose is to achieve a mutually beneficial settlement based on agreement of disputants (neg, med, facilitation, mini-trial and arb/med)
5. Litigation focuses on past wrongs and is based on attribution of blame. ADR concentrate on problem solving directed at future relationship of parties (well suited to situations where disputants will be in long-term relationship)
6. Provides efficient methods for settling these issues out of crt. (cost saving)

ADR: weaknesses

1. ADR processes do not guarantee the procedural rights of litigants
2. Decision of crt is binding and enforced through state by means of execution procedures; decisions reached by ADR processes are contractually binding
3. When litigation is used, access to crt and crt time are free. ADR processes, third intervenor must be paid as well as other related expenses. If settlement not reached, litigation costs also to be paid

:: objects and purpose of Small Claims Courts Act of 1984 ::

Objectives:

1. Make the administration of justice more accessible to all SA
2. Provide a forum for settling of minor civil disputes
3. Remove time-consuming, formalistic and expensive procedures
4. Intro informal and simplified procedures in order to reduce the cost of litigation and provide for speedy determination of small claims
5. Further reduce the cost of litigation by prohibiting legal representatives from appearing in small claims crt
6. Est. A consumer-orientated crt

Purpose:

- To solve problems experienced by litigants in other existing crts
- Extending basis of every citizen's right to have access to justice
- Facilitated by:
  1. Self-representation by plaintiff and defendant
  2. Simplified pre-trial proceedings
  3. Granting the commissioner an inquisitorial function

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:: differences between small claims courts and other courts ::

1. Representation of a litigant by a member of legal profession is disallowed. Intention to keep minimum legal costs (self-representation, pre-trial proceedings informal, rules of evidence relaxed, role of judicial officer is changed)
2. Pre-trial formalities have been simplified and reduced to barest essentials
3. Commissioner plays an active role in assisting the litigants to present their case at the trial (other: j.o has a passive role that requires him to listen to evidence which litigants present)

:: who is entitled to appear in small claims court ::

- Only natural persons
- Juristic person cannot commence an action is small claims as plaintiff – may become a party to an action as a defendant
- Litigants must appear in person and cannot be represented by anyone else
- Intention is to promote self-representation
- S 7(4) -> juristic person may be represented by its authorised officer or other officer

:: jurisdictional matters ::

S 12 – the area of jurisdiction of a crt shall be the area or district for which it was est.
S 14 – jurisdiction in respect of persons: subject to provisions of ss(2)[no action shall be instituted vs the State in a crt], a crt shall have jurisdiction in respect of –

(a) Any person who resides, carries on business or is employed within the area of jurs of crt
(b) Any partnership, as def, which has business premises situated or any member of which resides within area of jurs of crt
(c) Any person in respect of any proceedings, incidental to any action instituted in that crt by such person
(d) Any person, whether or not he resides, carries on business or is employed within are of jurs of crt, if cause of action arose wholly within that area
(e) Any def, whether in convention or reconvention, who appears and takes no objection to jurs of crt
(f) Any person who owns immovable property within area of jurs of crt in actions in respect of such property or a mortgage bond thereon

[coincides with s 28 Mag Crt Act]

S 15 (page 213 tb)
S 16 – a crt shall have no jurs in matters –

(a) In which dissolution of any mar / customary union is sought
(b) Concerning validity or interpretation of a will or other testamentary document
(c) Concerning status of a person in respect of his mental capacity
(d) In which is sought specific performance wo an alternative claim for payment of damages, except in case of –
    (i) Rendering of an account in respect of which claim does not exceed amount determined by Minister
    (ii) Delivery or transfer of any property, movable or immovable, not exceeding in value amount determined by Minister
(e) In which is sought a decree of perpetual silence
(f) I which is sought damages in respect of –
    (i) Defamation

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(ii) Malicious prosecution
(iii) Wrongful imprisonment
(iv) Wrongful arrest
(v) Seduction
(vi) Breach of promise to marry

(g) In which an interdict is sought

S22 provides that the small claims crt have no jurisdiction to hear a matter, which otherwise exceeds their jurs, by virtue of consent of parties

:: documents that are exchanged during pre-trial stage ::

Pre-trial stage is conducted as follows:

1. A letter of demand is delivered to def allowing 14 days from date of receipt of demand to satisfy claim
2. If def doesn't satisfy claim set out in letter, summons must be issued out of small claims
3. Before issuing summons, clerk of small claims must set a time and date for hearing, this info also being contained in summons
4. Summons served on def. Litigants themselves may affect service. (other crts = Deputy Sheriff)
5. No pleadings are required from litigants. However, def may at any time before hearing, lodge with Clerk of Crt a written statement describing nature of his defence as well as particulars of grounds on which it is based. Copy of this statement must be supplied by def to plaintiff

:: role of commissioner for small claims ::
:: matters relating to evidence ::

- Rules of evidence don't apply in respect of proceedings in small claims crts
- Commissioner has discretion to est. Any fact in a manner that is suitable under given circumstances
- S 26(3):
  1. A litigant may not question or cross-examine any other litigant to proceedings in q or a witness called by litigant
  2. Commissioner must proceed inquisitorially in order to est. The relevant facts
  3. and in this regard he may q and litigant or witness at any stage of proceedings
  4. provided that commissioner may in his discretion allow any litigant to put a q to other litigant or any witness
- allows comm. To play an active role in proceedings, which is unlike the passive role played by j.o presiding in other crts
- evidence to prove or disprove any fact in issue may be submitted in writing, or oral evidence may be heard
- litigant may call one+ witnesses to prove his claim or defence
- right of a litigant to call a witness does not affect comm. Power to decide that sufficient evidence has been adduced on which a decision can be made, and that no further evidence may be led

:: restriction in regard to appeals ::

S 45 clearly states that a judgment or order of small claims crt is final and no appeal will lie vs it
No appeal is possible vs a judgment or order of small claims
Small claims crts are not crts of record, and appeal is always on record

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:: grounds for review ::

1. absence of jurs
2. comm. Interest in action, or his bias, malice or corruption
3. gross irregularity with regard to proceedings

:: power of a court to hear a matter ::

- requires presence of some link or jurisdictional connecting factor (*nexus*) btwn crt and parties or cause of action

:: power of a court to enforce its judgment ::

- derived from doctrine of effectiveness (su 10.2)

:: why there is a need to determine which court can exercise jurisdiction prior to start of litigation ::

- no single crt exists in SA which has jurs as crt of first instance to hear all disputes instituted anywhere in country
- there must be some link *(nexus*) btwn crt and parties or subject matter of dispute
- such crt must be able to give an effective judgment (can be enforced) before it will hear a matter
- failure to consider jurs issues will have serious consequences, since it an action is instituted in a crt which is not vested with jurs, such crt will refuse to hear matter and a fresh action will have to be instituted in another crt
- in const terms, SA is a unitary state
- various h. Crts exist, each serving a specific geographical area – each is largely independent of others and decision of one crt is not binding on similar crts
- territorial independence of various H. Crts causes jurs problems
- each H. Crt has original jurs over all causes arising in its territorial area
- once a decision has been taken on issues, and it has been determined that a H. Crt should hear a matter, jurs problem concerning which of various crts is competent to hear it must also be addressed

"Jurisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter"

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision"

Actor sequitur forum rei

Plaintiff must institute action against the defendant in the area in which the defendant is domiciled or against the defendant in area in which the defendant in domiciled or resident
If another link with court exists, need not be used
If this rule is followed to give jurs to crt, such crt is said to have jurs *ratione domicilii*

Dominus litis

More than one crt may be able to exercise jurs in same action if various *rationes jurisdictionis* exist in respect of different crts
In such an instance, plaintiff may, as *dominus litis* (master of the suit) choose in which of these crts which are vested with jurs he wishes to institute action

Incola and peregrinus

An *incola* is a person who is either domiciled or resident within a specific crts is of jurs
A *peregrinus* is a person who is neither domiciled nor resident within that crts area of jurs
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- these two terms apply to each H. Crt as a separate entity and not to SA as a whole (person domiciled/resident in area of Durban H. Crt is regarded as a *peregrinus* of Pretoria H. Crt)
- citizenship of a country is not relevant when determining whether someone is an *incola* or a *peregrinus*. A person may be a citizen of a particular country wo ever having been domiciled or resident there. Citizenship is therefore irrelevant for purposes of jurs
- when dealing with the term *peregrinus*, a distinction is drawn btwn a person who doesn't live within jurs are of a specific crt, but elsewhere in SA – local *peregrinus* – and a person who lives outside SA – a foreign *peregrinus*. Different jurs rules apply

Nexus

Link
In jurs context, it is the link or connection which gives a specific crt jurs over a particular person or cause of action

Rationes jurisdictionis

Rules of jurs provide that there must be some link btwn crts jurs area and the defendant, or the facts from which the dispute arose
Links accepted by our crts include domicile, residence, commission of a delict, conclusion or breach of contract, submission and location of property where such property is subject of dispute
Links exist only in respect of monetary claims

Ratione rei gestae

Under common law a crt will be vested with jurs in respect of monetary claims:

1. if contract which is subject to litigation was concluded, was to be performed or was breached within crt area of jurs, any of these grounds will be sufficient to vest a crt with jurs – then said to be vested with jurs *ratione contractus*
2. if delict on which claim is based was committed within crts area of jurs, a crt is vested with jurs ratione *delicti commissi*

collectively two grounds are termed *ratione rei gestae*
crt is not limited to these two grounds – it may also be vested with jurs on another ground

Ratione domicilii

Under common law, the crt where defendant is either domiciled or resident always has jurs to hear a claim sounding in money

Ratione rei sitae

Connecting factor is relevant only in respect of property claims
Under common law, crt where property is situated is only crt which has jurs to hear claims relating to such property

Attachment to found or confirm jurisdiction

'attachment' doesn't refer to attachment of property for purposes of safekeeping or of execution of judgment
Word 'attachment', in jurs context, refers to one of grounds upon which a crt justifies its exercise of jurs in respect of monetary claims
Relevant only when dealing with jurs in respect of money claims where defendant is foreign *peregrinus*
Arrest to found or confirm jurs has been held to be unconst

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Claim sounding in money

The std term used to describe an action based upon a claim which seeks either payment of money or payment of money as an alternative to some other order
If in doubt, consider the relief which the plaintiff seeks: if payment of money, claim is one which sounds in money

Doctrine of effectiveness

One of common law principles on which exercise of jurs is based
Crt will not exercise jurs unless it is able to give an effective judgment (compliance with judgment can be expected)
Where a defendant resides in SA, compliance can be enforced y execution or contempt proceedings
Where defendant resides out SA, arrest or attachment to found or confirm jurs is necessary in order to give crt some control over def or property
No crt can ensure that a particular def will be in a position to comply fully with an order
Purpose of doctrine: to ensure that crt proceedings are not completely futile from start – it doesn't guarantee compliance with all judgments
Doctrine must not be seen in isolation, and is frequently not followed cos of other considerations

Domicile

Acquired by lawful presence at a particular place with intention of settling there for an indefinite period
If def is domiciled in crts area, crt has jurs even if def is not present in person in the area at that time

Reside

Amounts to more than mere physical presence in a place, while being less than domicile, in that there must be some element of intention to prolong stay beyond limit of mere casual or temporary visit
EX PARTE MINISTER OF NATIVE AFFAIRS following principles were laid down:

1. a distinction should be drawn btwn place of residence and *domicilium*. A person may be domiciled in one place and reside in another
2. a person may have more than one place of residence, in which case he should be sued in jurs area of crt in which he is residing at time of service of summons
3. person doesn't reside in a place which he visits only temporarily

:: relationship between common law principles and legislation ::

CLAIMS SOUNDING IN MONEY:

- common law principle which applied in respect of claims was *actor sequitur forum rei*
- principle of *ratione rei gestae* and problems of litigating abroad have resulted in situation where crts other than crt in which are the def is domiciled or resident may also exercise jurs

CLAIMS RELATING TO PROPERTY:

- Principle that the *forum rei sitae* is only crt which may exercise jurs has remained unchanged

MATRIMONIAL ACTIONS:

- Ito common law principle which applied to divorce actions, only competent crt was that where parties were domiciled
- Principle has now been altered by statute

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CONSTITUTIONAL ACTIONS:

- S 167(3) Const defines a const matter as including any issue involving the interpretation, protection or enforcement of Const, and provides that the final decision on whether or not a matter is a const matter rests with CC

S 19(1)(a) SCA has been interpreted as providing that common law still applies – unless specifically altered by leg – when determining jurs in H. Crts

- Essential q when determining jurs in respect of monetary claims is WHERE DOES THE DEFENDANT LIVE?

DEFENDANT INCOLA OF COURT	DEFENDANT PEREGRINUS OF COURT BUT NOT OF SA	DEFENDANT PEREGRINUS OF SA
Crt where defendant incola Or Crt were cause of action arose	Crt where cause of action arose	Crt where plaintiff incola + attachment Or Crt where cause of action arose + attachment Or crt where cause of action arose + submission
Ground of jurs is known as ratione domicilii A crt has jurs over a def who is an incola of its area at the time when action is instituted Irrelevant whether the plaintiff is an incola or a peregrinus, or where the cause of action arose	'cause of action' comprises the facts which give rise to an enforceable claim Known as ratione rei gestae Irrelevant whether the plaintiff is incola or a local or foreign peregrinus Essential that defendant must be a local, not a foreign, peregrinus	Crt will assume jurs if plaintiff is an incola of crt, and if attachment of defendant's property has taken place Attachment is known as ad fundandam jurisdictionem It isn't necessary that the cause of action should have arisen within crts area of jurs; attachment as fundandam jurisdictionem alone founds jurs and constitutes ground on which assumption of jurs is justified An order for attachment ad fundandam jurisdictionem is permissible only if a further condition is complied with, that is, if plaintiff is an incola of crt concerned
Only problems encountered with regard to this jurs connecting factor, are procedural ones Rule states that a defendant must be domiciled or resident within the crts area of jurs at time action is instituted Action is instituted when summons is issued and served	All claims which are instituted are based on some cause of action Cause of action usually arises either from a contract (ex contractu) or a delict (ex delictu)	Page 89 tb Attachment to found jurisdiction is permissible where: 1.defendant is a peregrinus of whole Republic 2.attachment of defendants property has taken place 3.plaintiff is an incola of crt concerned, in an instance where cause of action has

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		arisen outside crts area of jurs [jurs isn't conferred on ground that plaintiff is incola of crt – only a requirement]
From a jurs point of view, the defendant need not e physically present in crts area of jurs at time when action is instituted Person may be domiciled at a place where he isn't currently resident, and such crt will have jurs ratione domicilii Also possible that a person will be working or on holiday outside crts jurs area at time when action is instituted	In following instances, crt will be vested jurs cos of action arose within its jurs area: 1.Where contract which is subject of litigation was concluded or breached within crts area of jurs, or where performance of contract was intended to be effected within crts area of jurs. Any of these grounds will be sufficient to vest a crt with jurs. Crt is then said to be vested with jurs ratione contractus 2.where the delict on which the claim is based was committed within a crts area of jurs. In this instance, crt is vested with jurs ratione delicti commissi	Where the def is a foreign peregrinus and cause of action arose within area of crt concerned: Where a def is a peregrinus of whole of Republic, crt will be competent to exercise jurs if cause of action arose within its area of jurs and if attachment of def property has taken place within SA (attachment *ad confirmandam jurisdictionem* – attachment confirms partial jurs which a crt has by reason of fact that cause of action arose within its area of jurs) Although a crt has partial jurs based on fact that cause of action arose within area of jurs, it won't be competent to exercise jurs unless attachment *ad confirmandam jurisdictionem* has taken place, cos def is foreign peregrinus Where a crt exercises jurs based on attachment *ad confirmandam jurisdictionem* nature of proceedings is irrelevant, provided that money is claims (ratione contractus and ratione delicti) Makes no difference whether plaintiff is incola or peregrinus of crt concerned All grounds for cause of action based on ratione contractus needn't arise wholly within crts jurs area for that crt to be vested with jurs – more than one crt could exercise jurs on this ground, provided that necessary attachment can be effected
If a defendant is domiciled in area of one crt and resident in another, the crts may exercise jurs on ground of ratione	No other requirement need be met before crt in whose area of cause of action arose may exercise jurs	S19(1)(c) page 33 tb Provides that attachment to found or to confirm jurs may take place anywhere in

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domicilii	It is not possible for jurs to be confirmed or extended by attachment of defendant, in contrast to position of foreign peregrine defendants S 28(1) prohibits attachment, for jurs purposes, of persons domiciled or resident anywhere in Sa Effect of section is that in regards to local peregrine, attachment for purpose of founding or confirming jurs, is not only unnecessary, but prohibited	Republic Attachment of a peregrine def property needn't take place within the jurs area of crt in which action is instituted but may be affected within the jurs area of any other crt within Republic in which property is situated S 19(1)(c) was enacted so as to waive common law and enable plaintiff to proceed with action wherever peregrine def property was situated in Republic, but outside jurs area of crt concerned
	This has a broadening and diminishing effect on basis of crts exercise of jurs Has broadened basis of jurs in that attachment is unnecessary, and jurs can be assumed merely on ground that cause of action arose in crts area of jurs Power of crt to exercise jurs has been diminished cos attachment is prohibited	Attachment of def property precedes commencement of main action (before main action, an appl on notice of motion is brought requesting attachment of def property Onus is on applicant to show that, prima facie, he has a cause of action Appl for an order for attachment is a separate issue which precedes the principal claim, it is decided separately and so crt will not go into merits of main action
		If attachment is ordered, def property will be subject to attachment until judgment has been given in main action Unless such def furnishes security for value of claim in order to obtain the release of his property

:: circumstances in which a foreign peregrinus may submit to the jurisdiction of a crt ::

- Submission to jurs is relevant only where monetary claims are concerned, in claims relating to property or status, a particular crt usually has exclusive jurs
- Persons who may submit to jurisdiction:
    1. Where def is an incola of crt
- Submission to jurs by an incola def will never occur, since crt is already vested with jurs ratione domicilii
- 2. Where def is a peregrinus of crt concerned but an incola of some other SA crt
- Crt held that despite submission to jurs, one of traditional grounds of jurs, or rationes jurisdictionis, still had to be present

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- Appears a local peregrinus cannot submit to jurs of a crt but that action must be instituted against him in crt within whose area cause of action arose/where he is an incola

3. Where def is a peregrinus of SA and plaintiff an incola of crt concerned

- Veneta case: crt decided that in addition to submission, one of traditional grounds of jurs also had to be present
- Fact that crt may exercise jurs if plaintiff is an incola, def a foreign peregrinus, and attachment to found jurs has taken place, was not viewed as a traditional ground of jurs, but as a development to assist incolae to litigate at home
- Briscoe v Marais: held that this meant that submission could not take place unless cause of action arose within crts jurs area, irrespective of whether plaintiff was an incola or peregrinus
- Current position is that a peregrinus def cannot avoid an attachment to found jurs by submitting to crts jurs

4. Where def is a peregrinus of SA and plaintiff a local or foreign peregrinus

- Cause of action must have arisen within its jurs area, and attachment to confirm jurs must have taken place
- If foreign def submits to a crts jurs in such circumstances, and does so prior to attachment order being made, submission will render attachment unnecessary
- Appears this is the only instance in which submission to jurs can take place
- Rather than being an independent ground on which jurs can be exercised, submission is a substitute for confirmation of jurs by attachment

:: at what procedural stage submission will be accepted by court concerned ::

- Submission can occur wither by way of mutual consent of both parties or as a result of def unilateral action
- Mutual consent is usually embodied in a contract or other documentary proof
- If a dispute arises about whether the actions of def are consistent with submission to jurs, onus rests on plaintiff to prove that def behaviour has given rise to a clear inference that he submitted to jurs of crt
- Held that the
    1. filing of a plea on merits
    2. a request for security in respect of costs
    3. a request for a postponement
    4. failure to object timeously to jurs of a crt
- will be deemed to be submission
- Noting of an appearance to defend a matter is not regarded as submission
- In Bettencourt v Kom, in reply to q whether a peregrinus def can submit to jurs of a crt after attachment has occurred so as to obtain the release of his property, held that submission after attachment is too late and cannot be set aside by crt
- Irrespective of whether submission took place unilaterally or by mutual consent, crt concerned will not accept that it is vested with jurs unless cause of action has arisen in area of crt concerned

:: jurisdictional principles relating to property are governed solely by common law ::

- General common-law principle is that the forum rei sitae (crt in whose area property is situated) has jurs to hear claims relating to such property
- Jurs of such crt is exclusive which means that no other crt may hear this claim

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- Where object of relief is immovable property, crt in whose territorial area the immovable thing is situated, has exclusive jurs in actions: to determine title to immovable property, for transfer of immovable property, for partition of immovable property, where a real right is in dispute, where possession of immovable property is claimed, where recission of a contract for transfer of immovable property is claimed (doesn't matter whether def is incola or peregrinus)
- Where object of relief is movable property, crt in whose territorial area the movable property is situated has jurs in any action: to determine title to such property, for delivery of movable property, where a real right in respect of such property is at issue

:: *forum rei sitae* and when *forum domicilii* also has jurisdiction::

- Whether the jurs of forum rei sitae is exclusive as far as movable property is concerned, is open to debate
- Unlike immovable property, movables can be removed from the jurs area of crt, while remaining under control of their owner or possessor
- Crt which has power over owner, that is, the forum domicilii of such person, should also be able to exercise jurs
- This is cos once judgment has been given, and provided that the property is somewhere in Sa, such judgment can be enforced anywhere in country ito s 26(1) of SCA
- Our crts haven't decided this q
- Current position is that while the forum rei sitae will always have jurs, it is unclear whether the forum domicilii of def will also be able to exercise jurs
- Where forum rei sitae is approached for relief, it is irrelevant whether the def is a peregrinus or an incola

:: common law principles governing divorce jurisdiction ::

- Principles which govern issues of status are based on degree of recognition which will be given to the judgment crts in other countries
- A judgment which changes status often requires foreign recognition (monetary judgments are seldom enforced outside country where it was granted)
- if crt which gave judgment is not generally viewed as competent to give such judgment, its judgment might not be recognised elsewhere and status of parties would be in doubt (in respect of parties concerned)
- basic common law principle = court of common domicile of parties has jurs to hear an action for divorce
- crt where parties have their home is crt which has greatest interest in their status and future arrangements, pvt international law determines this to be appropriate crt to make such an order

:: concept of domicile in context of divorce jurisdiction ::

- DIVORCE ACT 70 of 1979 est. Both domicile and residence as separate grounds for exercise of divorce jurs
- Current leg position is that domicile or ordinary residence if either spouse within area of a High Crt is enough to confer jurs on that crt
- Domicile must be interpreted with def in s1(1) of Domicile Act and not with common law def

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:: ordinary residence ::

- does not require the party to be continuously present in area and that a person can be temporarily resident in one area and ordinarily resident in another

:: changes legislation has made to common law ::

- crt may exercise jurs on basis of independent domicile or residence of either husband ir wife
- domicile and residence are est. As independent and alternative jurs grounds
- s2(1): crt may exercise divorce jurs if both or either of parties is domiciled in its area of jurs on date on which action is instituted
- crt may also exercise jurs if both or either f parties is ordinarily resident in its area of jurs on date on which action is instituted, and has been ordinarily resident in Republic for a period of not less than 1 yr immediately prior to institution of action
- crt may exercise jurs in case of a divorce if only one of parties is either domiciled r resident in area of jurs – number of implications:
    1. domicile or residence of one spouse alone, is sufficient to confer the competence to exercise divorce jurs over other spouse
    2. domicile or residence of one spouse is sufficient to confer jurs even if other spouse is domiciled or resident outside Republic
- s2(1)(a) provides that, if both or either of parties is domiciled within area of crt, such crt will be competent to exercise divorce jurs, irrespective of period of domicile
- theoretically, a spouses domicile of one month, or even one day, within the area of a crt would confer jurs on such crt
- s2(1)(b) requires a period of residence of one year within Republic immediately prior to institution of action
- s2(2) provides that a crt which has jurs to adjudicate a claim for divorce ito s2(1) also has jurs in respect of a claim in reconvention or an appl in divorce action concerned
- s2(3) deals with choice of law determines that in circumstances stated therein, a 'crt' must apply its own law when adjudicating a 'divorce action'

:: what crts have jurisdiction to hear divorce and what crts may annul a marriage ::

- an action for declaration of nullity of a (void) marriage doesn't alter status of parties, cos in reality it is merely of a declaratory nature – in such case no valid marriage in fact existed and parties are only seeking legal confirmation of this fact before marrying other person
- following crts have jurs:
    1. forum loci celebrationis (crt of place where marriage was entered into)
    2. crt where plaintiff or defendant is domiciled at the time nullity proceedings were instituted
- in an action for annulment or dissolution of a marriage which is not void, but simply voidable, a change of status doesn't take place – until its set aside, it is a valid marriage, but once set aside status of parties changes for al purposes and they are in same position in which they were at time marriage was entered into
- Domicile Act provides that a woman can acquire her own domicile of choice during marriage, argued that current position is that domicile of either husband or wife will be sufficient to vest a crt with jurs to hear such matters

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:: matters in which CC has exclusive jurisdiction ::

- A const issue is 'any issue involving the interpretation, protection or enforcement of the Const'
- CC may decide only such matters and issues connected with decisions on such matters
- Cc has final decision on whether or not a matter is a const one and so will itself determine what matters it is prepared to hear
- CC is only crt which may hear certain const matters and has concurrent jurs in other matters
- S 167(4) = exclusive jurs

1. Decide disputes btwn organs of state in national or provincial sphere concerning const status, powers or functions of any of those organs of state
2. Decide on const of any parliamentary or provincial Bill, bu may do so only in circumstances anticipated in s79 or 121
3. Decide applications envisaged in s80 or 122
4. Decide on const of any amendment to Const
5. Decide that Parliament or President has failed to fulfil a const obligation
6. Certify a provincial const ito s144

- Exercises concurrent jurs with H Crt in respect of all other const matters
- Usual way of dealing with const matters is to approach relevant H Crt for a decision, decision may then be taken on appeal, when CC is crt of final instance and no further appeal is possible

:: when CC may be approached directly and when to appeal direct to CC::

- In exceptional circumstances, is possible to approach C directly or appeal to crt directly despite fact that matter concerned falls within concurrent jurs of CC and so should first be heard by H Crt or SCA
- CC must give leave for an approach to it and applicant must show that it is in 'interests of justice' that this Crt be approached direct

:: what constitutional jurisdiction the Supreme Court of Appeal exercises ::

- May decide appeals 'in any matter'
- But on const matters, further appeal to CC is possible
- When must an appeal from decision of H Crt be directed to SCA and when to CC?
- No appeal from any H Crt decision is possible wo leave of crt concerned
- If appeal deals with const and non-const issues, appeal must first go to SCA
- If appeal is const, appeal would go to SCA in normal course of events, but is possible to ask CC for leave to approach it directly, when it is in 'interests of justice' to do so

:: what constitutional issues are decided by the High Courts ::

- H Crt may now hear all const matters apart from those listed in s167 and those which have been assigned to another crt by national leg
- Only other limitation is, if such a crt makes a finding that parliamentary or provincial leg or conduct of President is unconst, this must be confirmed by CC
- Any order made by a H Crt or SCA on const invalidity is wo effect until confirmed by CC
- H Crt and SCA may grant temporary relief to assist party req relief until CC has confirmed final order

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:: different foundations for exercise of jurisdiction in High Courts and mag crts ::

- Most of common law principles which determine which of the various H Crts in country are competent to hear a matter, date from Roman or R-D times
- Jurs of H Crts is based on common law principles cos of what is termed 'inherent jurs'
- Result of inherent jurs is that H Crt may hear any matter which it could hear at common law, unless this has been expressly excluded by statute

:: implications of term 'creature of statute' ::

- Means that not only have they been created by statute, but also that they can only do what some statute permits them to do
- Cos mag crts may exercise only statutory jurs, common law principles are not relevant when determining jurs

:: three separate kinds of limitation on the jurisdiction of mag crts ::

1. High Courts: geographical limitation
2. Mag Crts: nature and amount of claim plus geographical limitation

- Page 116 sg

:: sections in MCA are of major importance when determining whether a mag crt has jurisdiction ::

- S 46 and 29 MCA
- 46 = types of claims which no mag crt whatsoever may hear
- 29 = maximum amount which may be claimed in mag crt action
- S 28 = jurs in respect of persons

:: what aspects of jurisdictions the other relevant sections of MCS relate ::
and
:: statutory and common law principles applicable in Mag Crts ::
Page 117 to page 118 study guide!!!!

:: what actions may never be instituted in mag crts ::

- Are restricted as regards to nature of cause of action
- Parties cannot by consent confer jurs on the crt

:: meaning of terms used in section 46 ::

- SECTION 46(1) MATRIMONIAL MATTERS
- Provides that a mag crt cannot grant divorce (divorce affects status and status can only be determined by H Crt)
- Mag crt will not have jurs in matters in which 'separation of goods of married persons' is sought (joint estate)
- Crt will have jurs to hear an action by one party vs other, if they are married OUT for return of goods claimed as his

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- Mag crt may sometimes determine matrimonial matters cos authorised to do so by some other statute
- SECTION 46(2)(a) VALIDITY OF WILLS
- Crts do have jurs to hear an action resulting from provisions of a will
- Must be a genuine dispute about validity or interpretation of will
- If def raises a q regarding validity with clear intention of preventing a mag crt from exercising jurs, crt will not easily find that it may not exercise jurs
- SECTION 46(2)(b) STATUS AS REGARDS MENTAL CAPACITY
- Mag crt not empowered to declare a person insane, or incapable of managing own affairs
- Ito s33, is authorised to appoint a curator ad litem to someone already declared insane or incapable
- SECTION 46(2)(c) SPECIFIC PERFORMANCE
- Specific performance of a contractual obligation
- Two q's:
    1. Was the phrase 'specific performance' limited to performance ito a contract or performance in general?
- Maisel v Camberleigh Court: held that the words were limited to traditional meaning of specific performance ito a contract, and could not be widened to include any order to perform a particular action
    2. Could payment of money ito a contractual debt ever amount to specific performance or was specific performance limited to performance of a particular action?
- Tuckers Land and Development Corporation v Van Zyl: held that a claim for payment of a purchase price ito a contract although strictly speaking a claim for specific performance, was not a claim for specific performance ito this section and that a claim sounding in money, whether the debt arose from a contract or not, could never be a claim for specific performance
- Final result in these cases is that this subsection applies only where there is a claim for specific performance of a contract that is where the def has to perform a particular act cos he contractually undertook to do so
- SECTION 46(2)(c)(i) RENDERING OF AN ACCOUNT
- Only when one party is in a position of trust, or when it is provided by statute, that the 'rendering of an account' can be requested
- SECTION 46(2)(c)(ii) and (iii)
- Order which may be granted is limited to delivery or transfer of movable or immovable property and no more
- SECTION 46(2)(d) PERPETUAL SILENCE
- A court order instructing someone who has threatened to institute legal litigation to do so within a set period
- If action is not instituted within this period, the person is barred from ever instituting action on those facts
- Garber v Witwatersrand Jewish Old Age Home: held crt would consider following factors:
    1. Nature and subject matter of claim
    2. Prejudice to parties
    3. Balance of convenience
    4. Period of delay since threat of litigation had commenced
    5. Whether the threats of litigation constituted a disturbance of the applicants rights
- When deciding to make such an order

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- Mag crt is prevented from making such an order presumably cos it limits rights of access to legal assistance

::financial limitations are placed on actions instituted in mag crts ::

- Financial limitations mean that even if a plaintiff has an action of a type which a magistrate's crt may hear, he cannot institute it in a mag crt if the amount claimed exceeds the financial limits imposed by s29
- Parties can by consent confer jurs on a mag crt to hear a claim in an amount greater than the financial limits set in s29
- Position is different in respect of s46, where parties cannot consent to exercise of jurs by a mag crt

:: meaning of terms used in section 29 ::

- SECTION 29(1) SUBJECT TO THE PROVISIONS OF THIS ACT
- Refers to other sections of Act dealing with jurs (s46)
- SECTION 29(1) ... CAUSES OF ACTION ... ACTION ...
- 'action' must be interpreted broadly and must not be restricted to mean proceedings instituted by way of summons only
- Refers to all proceedings in mag crts and includes all applications
- It includes all proceedings ito s30
- Proceedings ito s30 are also subject to restrictions imposed by s29 with regard to financial limitations
- SECTION 29(1)(a) ... DELIVERY OR TRANSFER OF ANY PROPERTY
- 'value' means actual market value of property concerned (amount which would be paid for property in an open sale)
- Plaintiff needn't state what the value of property is in particulars of claims, is up to def to allege that jurs limit is exceeded (one of exceptions in s42(2)(c)(ii)
- SECTION 29(1)(b) ... ACTIONS OF EJECTMENT ... WHERE THE RIGHT OF OCCUPATION IS IN DISPUTE BETWEEN THE PARTIES ...
- An action for eviction isn't a claim for specific performance
- Provisions of s29(1)(b) shouldn't be considered an exception with regard to s46(2)(c)
- Note:
    1. Rental for premises is not always the correct criterion for calculating the value of the right of occupation, since the rental value is really the value to the landlord, and, in certain cases, the rental value may be far below the true value of occupation to the occupier
    2. Capital value of the premises is also not necessarily an indication of the value of occupant, except where the def claims ownership of the premises
    3. Where premises are occupied for residential purposes, the value of the right of occupation is probably equal to the rental of other premises similar to the one in dispute, calculated over same period of occupation
    4. If, however, the premises are being occupied for business purposes, the value of the right of occupation is probably equal to either
        a. The cost of renting other premises on which the occupier has a reasonable expectancy of making the same profit as on the premises in dispute, or
        b. The amount of the profit which the occupier is reasonably expected to make on the premises in dispute

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- SECTION 29(1)(c) ACTIONS FOR THE DETERMINATION OF A RIGHT OF WAY, NOTWITHSTANDING THE PROVISIONS OF S46
- Not necessary to determine value of the right of way, as no limit is placed on the value thereof, and so it seems that mag crts may create or confirm any right of way, irrespective of its value to the parties
- SECTION 29(1)(d) .. LIQUID DOCUMENT OR MORTGAGE BOND ...
- Liquid document is a document in which a debtor, above his signature or that of his agent, admits he is liable for fixed or ascertainable sum of money
- Financial limitation relates to the amount that may be claimed in summons, not to amount of liquid document or bond
- Mag crt will have jurs in a claim for payment of R70 000 even if amount of bond is for R500 000
- SECTION 29(1)(e) ... CREDIT AGREEMENT AS DEFINED IN S1 OF CREDIT AGREEMENTS ACT 75 OF 1980
- Credit agreement is an agreement for an instalment sale or for a lease transaction
- Plaintiff in such action, who will be the person or institution who granted credit, can seek one of two things: recovery of property he sold by HP or lease OR payment of money owing ito the agreement
- If seeks recovery of property, value of the property at time of claim mustn't exceed financial limit
- if plaintiffs claim is for payment of one or more outstanding payments, each payment mustn't exceed the financial limit
- total amount of the various payments can exceed the limit, as each payment constitutes a separate claim
- SECTION 29(1)(f) ... ACTIONS IN TERMS OF S16(1) OF MATRIMONIAL PROPERTY ACT 88 OF 1984
- S16(1) MPA provides that where a spouse refuses to, or cannot, give consent to various transactions relating to property belonging to the joint estate or the other spouse and which require the consent of both parties, the other spouse may approach a mag crt for assistance
- Crt is approached by way of appl and may then authorise transaction
- In other instances, MPA provides that 'crt' means H Crt
- Exception was introduced to enable spouse requiring consent to avoid higher cost of appl in H Crt
- SECTION 21(1)(f) ACTIONS, INCLUDING AN APPLICATION FOR LIQUIDATION IN TERMS OF CLOSE CORPORATIONS ACT 69 OF 1984
- Only insolvency appl which a mag crt can hear
- SECTION 29(1)(g) ... ACTIONS OTHER THAN THOSE ALREADY MENTIONED ...
- Relevant when claims in the alternative are drafted
- SECTION 29(2) ... 'ACTION' INCLUDES A CLAIM IN RECONVENTION
- Claim in reconvention is a counterclaim which the def may institute vs the plaintiff when he defends the plaintiff's claim
- Confirms that these claims are also subject to the same financial limitations

:: when a particular court will have jurisdiction ::

- S28 answers q in which mag crt should this action, in which these parties are involved, be instituted?
- Link that should exist btwn jurs area of a specific mag crt and the person is respect of whom the crts jurs is being exercised
- Nb to litigate in correct mag crt

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- Some nexus/link must exist btwn jurs area of crt and def
- S28 sets out links which will give a particular mag crt jurs in respect of a specific set of facts
- Situation of def and not plaintiff will give a crt jurs
- Mag crt may be given jurs by an Act

:: provisions of sections 28 and 30 ::

- SECTION 28(1)(a) ANY PERSON WHO RESIDES, CARRIES ON BUSINESS OR IS EMPLOYED WITHIN THE DISTRICT
- Reside
- Amounts to more than mere physical presence in a place, while being less than domicile
- Must be some element of intention to prolong stay beyond limit of a mere casual/temp visit
- Ex parte minister of native affairs page 78sg
- Carries on business
- One of fact (all facts to be examined)
- Must be one's OWN business
- Company may be sued where local head office is
- Is employed
- An employee who falls outside ambit of other phrases
- Degree of permanent employment is required
- Time at which position is determined
- Mills v Starwell Finance: date of service of summons and not its date of issue is determining factor in est. Whether a def was 'employed within district' of mag crt concerned
- It is not the issue of summons, but the service thereof which brings def into action
- SECTION 28(1)(b) ANY PARTNERSHIP ... WITHIN THE DISTRICT
- Partnership isn't a juristic entity, and if sued ito common law, all partners have to be sued jointly – inconvenient
- This section provides that partnership can be sued in any area where it has business premises or where any one of partners resides
- Notice ito rule 54 is served together with summons
- Notice requires the partnership to state who all of partners were at time cause of action arose
- SECTION 28(1)(c) ANY PERSON ... IN RESPECT OF ANY PROCEEDINGS INCIDENTAL TO ANY ACTION ...
- Common law doesn't apply in jurs to mag crt
- Counterclaim is a claim by def vs plaintiff and is filed with plea, qualifies as a proceeding which is incidental to main claim – this isn't the position
- Many, but not all, counterclaims are incidental to the main action (arise from same facts of main action)
- So is possible that a def wont be able to file a counterclaim is answer to an action instituted vs him in a mag crt as crt lacks jurs cos counterclaim isn't incidental to main action
- However, if crt doesn't have jurs to hear counterclaim, but plaintiff doesn't object to jurs of crt, crt will have jurs ito s28(1)(f)
- SECTION 28(1)(d) ... CAUSE OF ACTION AROSE WHOLLY WITHIN DISTRICT
- Jurs is determined where cause of action arose and not where def is found
- In mag crt, Act provides that the cause of action must arise wholly in relevant area before a crt will be vested with jurs

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- Purpose of this section is to make matters convenient for plaintiff and witnesses in certain cases
- Where there is doubt as to area of jurs in which cause of action arose, it would be wise to proceed in mag crt which has jurs over matter ito another section
- SECTION 28(1)(e) ANY PARTY TO INTERPLEADER PROCEEDINGS ...
- Interpleader is a form of procedure by which a person in possession of property which is not his own, and which is claimed from him by two+ persons is able to call upon the rival claimants to such property to appear before crt in order that the right to such property may be determined
- Followed in cases where either sheriff of mag crt has attached property, and more than one person claims a right to property, or where a person other than the sheriff is in possession of property and conflicting claims are made in respect thereof
- SECTION 28(1)(f) ANY DEFENDANT WHO APPEARS AND MAKES NO OBJECTION ...
- If a person not subject to a crts jurs submits thereto, such crt will be vested with jurs by virtue of such submission
- Subject to same limitations as common law, thus def cannot confer jurs upon a crt in matters which it is not empowered to hear
- Ito this section we are dealing with a failure to object to crts jurs
- One can say that his failure to object, 'consents' to the crt jurs only in respect of his person
- Submission ito s28(1)(f) is valid only when a crt lacks jurs ito s29, then actual consent ito s45 is necessary
- SECTION 28(1)(g) ANY PERSON WHO OWNS IMMOVABLE PROPERTY ...
- Effect is to extend jurs to persons who own immovable property within area of jurs of a crt, but who otherwise not subject to such crts jurs ito any other provisions of s28(1)
- Mere fact that immovable property is situated within area of a particular crt doesn't automatically confer jurs upon that crt – action must be in respect of that particular property or it must be in respect of a mortgage bond registered over such property
- Person who owns property must be def in action
- Must be stated in summons that property concerned is situated within district
- SECTION 28(2) THE STATE AS DEFENDANT
- Person and def include the state
- Held that the q whether the respondent was entitled to sue appellant in CT mag crt had to be determined by reference to provisions of s28
- Crt ruled on grounds of convenience and in interests of certainty, one should adopt a similar rule to that which the crts apply when determining the forum in which a trading corporation or other artificial person is sued ito s28(1)(a)
- Pretoria is regarded as seat of govt
- SECTION 30
- Provides for arrest and attachment against anyone not resident in SA
- Section is worded widely and no limits are set on crts ability to order arrest or attachment to found or confirm jurs
- Generally held that it is improbable that leg would grant the mag crt greater jurs powers than those exercised by H Crts and that the section must be interpreted in light of equivalent common law position of H Crts

(procedure for obtaining an order for arrest or attachment page 139 sg)

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:: how sections of Act give mag crts jurs to make orders they would otherwise not have ::

- S30 – provides that mag crts may grant interdicts
- S31 and 32 – deal with forms of interdict peculiar to mag crt
- S37 – provides that to determine a matter which a mag crt may hear, crt may decide on matters outside its jurs
- S50 – deals with how a def can transfer a matter to H Crt if he isn't happy with fact that the matter is being heard by a mag crt

:: describe each form of order and procedure to be followed when each form of order is sought ::

- Section 30: interdicts
- Provides that mag crts have jurs to grant various types of orders which might otherwise be excluded ito s42(2)(c) which prohibits mag crt from granting orders for specific performance wo an alternative claim for damages
- Ito s30 crts may grant: (in all instances, provisions of s28 and 29 must be complied with)

1. Interdicts

- A crt order ito which a person is ordered either to perform or not to perform a specific act
- Prohibitory – must not perform
- Mandatory – must perform
- Final/temp
- Mag crts can grant both
- If nothing appears to the contrary in pleadings or in evidence, or if the def doesn't dispute plaintiffs allegation that matter falls within limits set by s29, crt will have jurs
- If it is impossible to determine the value of the interdict and plaintiff decides to institute action in H Crt, this crt will not penalise plaintiff by making an order for costs on the lower mag crts scale but will grant him costs on H Crt scale

2. *Mandamenten van spolie*

- Form of interdict
- Restitutionary interdict – an order forcing someone to return property he has taken unlawfully from another
- Person applying for such order needn't be the owner of property or have any claim to the property – needn't even be in lawful possession of property
- Object of this interdict is to prevent people from taking law into their own hands, and crt doesn't go into merits of matter for this reason, until the person whose possession was disturbed is placed in possession of the item
- Doesn't contravene provisions of s46 cos s46 isn't concerned with 'extraordinary remedies of a temporary nature'
- Value of property which must be returned will determine whether a mag crt is prohibited by s29 from exercising jurs

3. Arrests '*tanquam suspectus de fuga*'

- If a debtor owes money to a creditor, the creditor cannot enforce payment until a crt has given judgment vs debtor
- Debtor sometimes attempts to leave SA before granting of a crt judgment vs him cos once creditor has such a judgment, it can be enforced in most countries of world
- Procedure has been included in Uniform Rules of H Crt and MCA
- Its purpose is to stop a debtor from fleeing SA to evade a judgment (not to force them to pay)

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- Procedure: debtor who attempts to evade the crt may be arrested and compelled to give security for expected judgment in case that the creditor has instituted or proposes to institute
- Either the debtor pays an amount so that creditor is reasonably certain of recovering debt or debtor remains under arrest until crt gives judgment, when creditor can attempt to have judgment debt paid ito one of debt collecting procedures

4. Attachments

- In actions where the payment of $ or relief in regard to property is sought, it is sometimes possible to attach property in possession of def in order to obtain security for claim
- Attachment of property ito s30 isn't available in all instances – a person applying for an attachment must show that it is likely that respondent will dispose of property in order to frustrate his creditors or plans to abscond with his assets
- The other instance when such attachments are granted is when a person doesn't keep up his payments ito a credit agreement, and creditor wants to protect his position by attaching goods which he sold to debtor, to safeguard them
- Provisions of s31 and 32: rent interdicts
- as soon as a lessor falls behind with his rental, landlord acquires a tacit hypothec over all the household effects which are on leased property, for rent which is due
- moment household effects are removed from leased premises, tacit hypothec falls away
- landlord must ensure that household goods remain on premises, in order to maintain hypothec -> does this by obtaining a special form of interdict and attachment order which prohibits removal of goods from leased premises

1. automatic rent interdict

- simpler and less expensive than ordinary interdict
- when summons is issued for arrear rental, plaintiff may include in summons a notice prohibiting anyone from removing from leased premises, any of household effects which are subject to hypothec, until an order dealing with such goods has been made by crt
- notice in summons serves automatically as an interdict, forbidding anyone with knowledge thereof to remove goods from premises and no crt application or other formalities are required
- lessee or anyone else who is affected by notice may apply to crt to have it set aside
- notice is addressed not only to def but also to all other persons and anyone who is aware of notice may not remove items from premises
- summons in which rental is claimed takes usual form, with addition of a paragraph which contains automatic rent interdict

2. attachment of property in security of rent

- automatic rent interdict is effective only vs persons who have knowledge of it
- persons who aren't aware of contents of summons won't be in breach of interdict if they remove property from premises
- to protect the household goods vs removal by anyone at all, s32 provides for an attachment order to supplement effect of interdict and to secure goods effectively
- s32 provides that crt may authorise the sheriff to attach enough of movable property on premises which is subject to landlord's hypothec, to satisfy amount owed
- landlord must apply to crt and in supporting affidavit, state:
    1. amount of rent due and in arrears
    2. that rent has been demanded in writing at least 7 days or is this is not so, that he believes that the lessee is about to remove the movable property on premises to avoid paying rent
- landlord must provide security for all costs, damages and expenses which may be a result of this order, should it be set aside at a later stage

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- lessee may apply to have order set aside
- he may consent to attached property being sold in execution in order to pay rent
- if neither of these options is chosen, def must plead to summons and usual trial procedure will follow
- section 37: incidental jurisdiction
- sometimes a q arises during proceedings of mag crt which falls outside jurs of these crts
- this section provides that while a mag crt cannot make an ORDER on matters falling outside it jurs, it may make a FINDING on such matters
- test to decide whether a crt may decide a matter ito s37 is to look at the relief crt is asked to grant – if relief falls within jurs limits of s46 and s29, crt may grant such relief even if this means that it has to consider and make a finding on, matters outside it jurs
- 37(1) deals with one specific matte where the jurs limits of s29 are exceeded
- 37(2) deals with matters in which crt has no jurs ito either s46 or 29
- Section 50: removal to High Court
- despite the fact that the matter falls within jurs limits of 46 and 29, a party feel that a matter is too complex for him to wish it to be heard by a mag
- if party is plaintiff - always able to institute action in H Crt
- def doesn't have choice – is served with summons from crt chosen by plaintiff
- s50 gives def opportunity to have a matter moved from mag crt to H Crt if he isn't satisfied with having it heard by lower crt
- if def wishes to exercise this option, an appl must be made ti crt where summons has been issued
- def must state:
    1. amount of claim exceeds R3 000
    2. applicant objects to matter being heard by any mag crt
    3. notice of intention to bring appl has been given to plaintiff and other def
    4. applicant will furnish such security as crt determines for payment of amount claimed and costs
- if applicant complies with these requirements case must be stayed in mag crt
- plaintiff may then elect to have matter transferred to relevant H Crt having jurs, or he may decide to issue a fresh summons in H Crt
- only check on def freedom to require that a matter be heard before a H Crt rather than mag crt is costs order with H Crt may make
- if plaintiff is eventually successful, crt may grant him H Crt costs on attorney and client scale (higher than party and party scale)

:: when a mag crt may determine matters falling outside its financial limits ::

- s 38 and 39 – how to reduce a claim so that it falls within jurs limit of mag crt
- s 45 – how parties can consent to jurs of a mag crt despite the fact that amount claimed is higher than limit or that crt doesn't have jurs ito s28
- s 40 – one claim cannot be split into many different smaller claims to bring claim within financial limits
- s 43 – how to institute an action where more than one amount is claimed which in total exceeds the jurs limit, although each amount is less than limit
- s 47 – situation in which a counterclaim which falls outside jurs of mag crts is filed in response to a plaintiffs claim instituted in a mag crt
- section 38: abandonment of part of claim
- effect: 38 provides that i order to fall within jurs limit of mag crts, a plaintiff may abandon a part of claim if it exceeds this limit so as to fall within the jurs of the crt

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- details of abandonment must be set out explicitly in summons or document if abandonment occurs later in proceedings
- crt will consider and make a finding on full amount due before abandonment, but can only order payment of maximum amount permitted by s 29
- if crt finds that amount due exceeds its limits but is not full amount claimed, amount that plaintiff was unable to prove is deducted first from the amount which was abandoned
- a plaintiff who abandons a portion of his claim will receive the amount proved or maximum that the crt can grant, whichever is lesser amount – if a plaintiff proves that he is owed more than jurs limit, crt can award only maximum allowed; if plaintiff cannot prove maximum amount, he cannot be awarded more than is proved
- if def institutes a counterclaim any amount awarded as counterclaim is deducted from amount actually awarded to plaintiff, not from amount that her claimed before abandonment
- procedure: rule 6(3)(b) requires that particulars regarding any abandonment of part of a claim ito s 38 must appear in summons
- s 38 provides that plaintiff may in his summons or at any time thereafter, abandon part of his claim
- plaintiff may therefore, until time of judgment and even during trial, abandon part of his claim
- after service of summons, plaintiff may abandon part of his claim by amending his particulars of claim in accordance with the procedure prescribed in s 55a and 55
- section 39: deduction of an admitted debt
- effect: a plaintiff who uses the provisions of s 39 will always be awarded the amount proved in crt, less the amount admitted as due to def
- page 152 sg
- procedure: particulars must be mentioned in summons although deduction may be made at a later stage but before judgment by amending summons in accordance with the procedure set out in sections 55a and 55
- comparison btwn s 38 and s 39: both section sonly become relevant if plaintiff has a claim which exceeds the jurs limit of a mag crt, but nevertheless wishes to litigate in this crt
- s 39 is only relevant if above circumstances exist and plaintiff is indebted to def -> of both exist, more advantageous as plaintiff doesn't run risk of abandoning a portion of his claim ito s 38 and then seeing the award made by crt reduced by a successful counterclaim
- if plaintiff doesn't owe money to def and possibility of a counterclaim doesn't exist, s 39 becomes irrelevant and a plaintiff must decide whether to abandon an amount ito s 38 or litigate in H Crt
- in appropriate circumstances a plaintiff may use both sections together to bring a claim within the jurs of crt by deducting whatever amount he owes to the def and then abandoning any remaining amount which exceeds the jurs of crt
- while a plaintiff will not lose the full amount he has abandoned if total claim cannot be proved (short fall is set off vs the amount abandoned) he will always lose any amount admitted as due to def as this amount will be deducted from amount plaintiff has proved, not amount he has claimed
- section 45: consent
- effect: gives parties opportunity to consent that a mag crt may hear a matter btwn them despite fact that such a crt doesn't have jurs ito either s 28 or 29
- provides that parties cannot consent to a crts hearing a matter that is excluded from jurs by s 45

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- both parties must consent to jurs – def must agree to cooperate with plaintiff before provisions of s 45 can be used
- deals with three possibilities:
    1. where crt has jurs over def ito s 28 but amount of claim exceeds the limitations imposed by s 29
- written consent may be given at any time regardless of whether the action has already been instituted or is about to be instituted
- must be written
    2. where crt has no jurs over def ito s 28 and amount of claim exceeds limitations imposed by s 29
- consent must be given 'specifically with reference to particular proceedings already instituted or about to be instituted in such crt'
    3. where crt has no jurs over person of def and amount of claim is within limitation imposed by s 29
- consent must be given 'specifically with reference to particular proceedings already instituted or about to be instituted in such crt'
- page 155 sg
- procedure: the consent ahs to be in writing and has to be given by all parties involved
- doesn't necessarily have to take form of an agreement
- need merely be written proof that parties have consented to jurs of a particular crt
- doesn't require that written consent be signed by parties
- onus is on plaintiff to prove that def consent has been obtained it plaintiff avers that crt has jurs ito s 45
- section 43: cumulative jurisdiction
- where more than one claim, each based on a different cause of action, is contained in one summons, the crt has, ito s 43, the same jurs in respect of each claim that it would have had if separate actions had been instituted regarding each claim
- 43(1) expressly requires that two or more claims be founded on difference causes of action
- In a civil claim on ground of injuries sustained during an assault, plaintiff cannot claim one amount for hospital expenses incurred during treatment and in a separate claim, seek an amount for loss of the amenities of life, if total amount of claims exceeds crts jurs
- 43(2) provides for an exception to the restriction imposed by 43(1)
- Page 156 sg
- Section 40: splitting of claims
- Matter is merely approached from another angle – prevents one cause of action which could possibly result in more than one claim, which would together exceed crts jurs from being split in such a way that separate claims can be brought in separate actions, each of which falls within crts jurs
- Page 156 sg
- Mohamed & Son v Mohamed supra:
    1. There is no splitting of claims where claims are based on different causes of action
    2. Claims which are not distinct and separate and which arise out of one and the same cause of action must be sued fora s one claim in one action and must not be split
    3. In order to succeed with a defence based on s 40, the def has to prove apart from splitting of claims, that the objective of plaintiff was to recover an amount owing to him in more than one action

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- An objection that a substantive claim (claim arising from a single cause of action) has been improperly split as contemplated in s 40 amounts to a defence in which jurs of crt is attacked
- Such an objection will be raised in a plea, which can be placed on roll for a separate hearing ito rule 19(12)
- Section 47: counterclaims exceeding jurisdiction
- Allows def to apply to have his counterclaim decided by a H Crt before plaintiff's claim is heard by a mag crt
- 47 read with rule 20 sets out procedure for applying for a counterclaim to be heard by H Crt
- Def must ask mag crt where plaintiff has instituted action to decide whether or not the counterclaim exceeds its jurs
- Def must persuade the crt that he appears to have a reasonable prospect of obtaining a judgment on counterclaim that will exceed jurs of mag crt
- If crt does find this, it does not make an order relating to def counterclaim but orders that the plaintiff's claim must be suspended/stayed for a reasonable period, so that def can institute action in a competent crt (H Crt)
- Def must then institute action within the period for which the plaintiffs action was stayed
- Plaintiff may institute his original mag crt claim as counterclaim to def H Crt proceedings
- If def fails to institute action within this time, the mag crt may stay the plaintiffs claim for a further period, or it may dismiss the def counterclaim and proceed to determine the plaintiffs claim

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